79-1226

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. A-597

DONALD DITTO,
Petitioner,

vs.

DAVID ROSENDALE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California in and for the Third Appellate District

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PETITIONER shown above prays the Supreme Court to grant a writ of certiorari to review the judgment of the Court of Appeal of the State of California in and for the Third Appellate District entered in the above-entitled case on July 20, 1979, and upon which a hearing was denied by the Supreme Court of the State of California on October 11, 1979.

OPINION BELOW

Judgment for Petitioner against Respondent ROSENDALE was entered in the Superior Court of the State of California, County of Sacramento, on August 16, 1977,

in the amount of $159,500.00, and is presented in Appendix A hereto, *infra.*

The opinion on rehearing of the Court of Appeal of the State of California in and for the Third Appellate District, reversing the judgment for Petitioner is unreported and is presented in Appendix B hereto, *infra.*

Petitioner petitioned for a hearing in the Supreme Court of the State of California, but the petition for hearing was denied on October 11, 1979, with three of the seven justices being of the opinion that the petition for hearing should have been granted. The minutes of that court reflecting the denial, found in Volume 31, California Official Reports, November 13, 1979, are presented in Appendix C hereto, *infra.*

STATEMENT OF THE CASE

A. Review is sought of the judgment of the Court of Appeal of the State of California in and for the Third Appellate District, entered on July 20, 1979, reversing the judgment for petitioner entered in the Superior Court of the State of California, County of Sacramento.

B. Hearing was denied by the Supreme Court of the State of California on October 11, 1979. The time for filing a petition for writ of certiorari was ordered extended on January 10, 1980, by Mr. Justice William H. Rehnquist, to and including February 11, 1980.

C. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question

by writ of certiorari are 28 U.S.C. sections 1257(3), and 28 U.S.C. section 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the due process of law and equal protection of the laws provisions of the fourteenth amendment prohibit a state, itself a sovereign immune from liability, from extending to a state-employed physician the protection afforded by a 100-day preliminary condition-precedent-to-suit statute, not applicable to physicians generally, when the action is one for damages for medical malpractice suffered by the plaintiff at the hands of the state-employed physician while plaintiff was incarcerated in a state prison.

2. Whether a state may, consistent with the due process of law provision of the fourteenth amendment, impose upon a prisoner, incarcerated in a state prison and legally deprived of capacity to institute legal action while so incarcerated, who suffers damages proximately caused by medical malpractice inflicted upon him by a state-employed physician during the period of incarceration, as a condition precedent to the filing of legal action against a negligent physician, an obligation to present a formal claim for damages to the state within 100-days from his first knowledge of facts sufficient to put him upon inquiry as to actual malpractice, on penalty of being barred from action, even though the 100-day period expires while he is still incarcerated.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. Constitution of the United States, amendment 14, sec. 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

B. California Civil Code, section 1708 (See Appendix D).

C. California Code of Civil Procedure, sections 335, 340.5, 352 (See Appendix D).

D. California Government Code, sections 815, 815.2, 820, 825, 844.6, 905.2, 910, 911.2, 915, 945.4, 950, 950.2 (See Appendix D).

E. California Penal Code, section 2600 (See Appendix D).

STATEMENT OF THE CASE

Petitioner, Donald Ditto, a former inmate of a California state prison, was awarded a judgment of $159,500.00, against respondent David Rosendale, M.D., after a court trial of a medical malpractice action. This judgment followed a finding that respondent's negligence proximately resulted in post-surgical infection first discovered in October 1971, after treatment of a foot injury, and further resulted in osteomyelitis and amputation of petitioner's leg in April 1973.

In January, 1972, petitioner had by letter to the chief medical officer of the California Department of Corrections evidenced dissatisfaction with the care he was receiving. The letter did not constitute a valid claim because it was not in conformity with various California statutory requirements. Later in January 1972, petitioner was informed in writing and orally that the progress he was making was satisfactory and that he would in the future receive competent and adequate medical care.

Petitioner relied upon these representations until April 1972, when he sought legal advice. A claim was filed in May 1972, but the claim was found not to be timely because more than the maximum 100 days had elapsed from petitioner's letter of January 1972, which was determined to be the accrual date for the 100-day period.

Petitioner attempted to file a late claim, but the attempt was administratively and judicially denied. Petitioner was released from prison in April 1973, the same month that his leg was amputated. Petitioner's complaint was filed in June 1973, but was successfully demurred to by respondent because petitioner's civil rights had not yet been restored. Those civil rights were partially restored in August 1974, permitting petitioner to file his complaint for medical malpractice. An amended complaint was timely filed. At trial the court determined that despite the failure of petitioner to file a valid and timely claim before May 1972, respondent was estopped from asserting that the claim was not timely.

Judgment was thereupon entered for petitioner in the sum of $159,500.00, for general damages and future medical expenses. Upon appeal by respondent, the Court of Appeal of the State of California in and for the Third Appellate District, upon rehearing, in a two to one judg-

ment, reversed the judgment of the trial court, holding that it had erred in estopping respondent from asserting as a defense plaintiff's failure to file a timely claim. The Supreme Court of California denied a hearing, although three justices were of the opinion that a hearing should have been granted.

CONSTITUTIONAL ISSUES BELOW

The trial court resolved the issues of validity and timeliness of the claims by petitioner in favor of petitioner on the basis of equitable estoppel without the necessity of resort to constitutional issues.

Upon the appeal to the court of appeal by respondent, petitioner in his reply brief argued that "the statute requiring a claim as a prerequisite to suit against defendant in this case is unconstitutional" despite the awareness by petitioner that "the Supreme Court of the State of California steadfastly continues to reject claims that the public liability act is unconstitutional." It was further stated therein by petitioner "that it is difficult to conceive of a more eloquent statement concerning the unconstitutionality of the public liability act than [petitioner's] present situation . . . ." The court of appeal in reversing the judgment did so on nonconstitutional grounds and did not address the constitutional issues.

In his petition to the Supreme Court of the State of California for hearing, petitioner once again argued that "the claim statute as applied in this case, is unconstitutional as a denial of equal protection of the law to [petitioner] under the Federal Constitution" and that "the claim requirements as delineated and set forth [below] are arbitrary, capricious, and a denial of equal protection of the law to [petitioner] herein." The court, in denying the hearing, did so without a published opinion of the court or of the three justices who were of the opinion that a hearing should have been granted.

REASONS FOR ALLOWANCE OF WRIT

The Court of Appeal of the State of California and the Supreme Court of the State of California in conjunction with the Legislature of the State of California have imposed and applied against petitioner a statutory scheme which has denied petitioner basic due process and equal protection rights guaranteed to him against infringement by the state by virtue of the fourteenth amendment. Petitioner is to some extent representative of that large class of incarcerated persons who are denied civil rights and capacity to sue yet, because of the statutory California claims provisions, are required to adhere to various technical provisions while in prison. Respondent is representative of a class of persons who would otherwise be liable for their acts of medical malpractice but who are protected from civil suit by virtue of the application of the same claims provisions in their favor, when they would otherwise be subject to suit.

Sovereign immunity of the state is not directly at issue here. *Cf. Krause v. Ohio,* 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971) Nor is the constitutionality of claim statutes in general directly at issue here. *Compare Reich v. State Highway Dept.,* 386 Mich. 617, 194 N.W.2d 700 (1972); *Turner v. Staggs,* 89 Nev. 230, 510 P.2d 879, *cert. denied,* 414 U.S. 1079 (1973); *O'Neill v. City of Parkersburg,* 237

S.E.2d 504 (W. Va. 1977), *with Tammen v. County of San Diego,* 66 Cal. 2d 481, 58 Cal. Rptr. 249, 426 P. 2d 753 (1967); *Roberts v. California,* 39 Cal. App. 3d 844, 114 Cal. Rptr. 518, *hrg. denied,* (1974). The rationale of those cases is relevant, however, in assessing the constitutionality of petitioner's claim herein.

The first question presented is whether the due process of law and equal protection of the laws provisions of the fourteenth amendment prohibit a state, itself a sovereign immune from liability, from extending to a state-employed physician the protection afforded by a 100-day preliminary condition precedent to suit statute, not applicable to physicians generally, when the action is one for damages for medical malpractice suffered by the plaintiff at the hands of the state-employed physician while plaintiff was incarcerated in a state prison.

Petitioner recognizes that a state may for certain governmental purposes hold itself immune as a sovereign from action against it, or may condition claims against itself. The issue, however, is whether a state may protect its employees in activity which is neither sovereign activity nor another activity typically receiving absolute or conditional immunity from suit.

This case can be usefully compared with *Martinez v. California,* No. 78-1268 (U.S. Jan. 15, 1980). The due process attack on the absolute immunity granted therein to state parole officials is clearly distinguishable from the extension of the state's absolute immunity in this case to respondent.

In fact the state conditioned the immunity by granting immunity to respondent unless petitioner notified the state in a specified manner within 100 days of petitioner's knowledge of possible malpractice that he had a claim against respondent. The application of claim requirements to petitioner, a prisoner without capacity to sue, while incarcerated and before restoration of his civil rights, raises serious due process questions. The application of those requirements to petitioner in 1972 in favor of respondent, who would not otherwise have even been subject to suit by petitioner until restoration of petitioner's civil rights in 1974, had respondent been a nonpublicly employed physician, raises the equal protection problem.

The second question put before the Court is whether a state may, consistent with the due process of law provision of the fourteenth amendment, impose upon a prisoner, incarcerated in a state prison and legally deprived of capacity to institute legal action while so incarcerated, who suffers damages proximately caused by medical malpractice inflicted upon him by a state-employed physician during the period of incarceration, as a condition precedent to the filing of legal action against a negligent physician, an obligation to present a formal claim for damages to the state within 100 days from his first knowledge of facts sufficient to put him upon inquiry as to actual malpractice, on penalty of being barred from action, even though the 100-day period expires while he is still incarcerated.

This question raises the issue of due process alone, separate from equal protection and sovereign immunity, in the context of the factual situation of a prisoner otherwise subject to the complete control of the state prison system

and its officers and employees. To require such a prisoner to have knowledge of and conform to the requirements of the state claims provisions in such a setting, or else be forever barred from bringing a medical malpractice action against the physician, appears once again to violate due process of law.

The constitutional infirmities in the California statutory scheme as applied to petitioner may be more easily perceived by an overview of the most relevant statutues which are set forth in Appendix D.

Had petitioner been complaining against respondent as a nonpublicly employed physician, he would have had one year from discovery of the injury to bring his action. Code of Civil Procedure, sections 335, 340.5. No prior notice of claim would have been required. That period of time would have been tolled while petitioner was in prison on a criminal charge. Code of Civil Procedure, section 352(a).

Because petitioner was, however, at all relevant times prior to April 1973, a prisoner the various claims provisions were held by the courts below to be applicable. By California legislation a public entity is not liable for an injury except as set forth by specific statutory provisions. Government Code sections 815, 815.2. A public employee is, however, liable for injury caused by act or omission to the same extent and subject to the same defenses as if he were a private person. Government Code section 820. Normally a public employee sued for such an injury occurring within the scope of employment is, upon request, entitled to a defense and to indemnity for any judgment. Government Code section 825.

However when a prisoner is injured, the state is by statute not liable. Government Code section 844.6(a)(2). A public employee responsible for such an injury remains liable, but the state is generally not required to pay any judgment nor indemnify any such employee. Government Code section 844.6(d). An exception exists when the public employee is one engaged in the healing arts who is sued for malpractice. For such an employee the state, despite its own immunity, has agreed by statute to pay a judgment against the employee. *Id.*

As a general rule, a claim need not be presented as a prerequisite to an action against an employee. Government Code section 950. An action against a public employee is barred, nevertheless, if an action against the employing public entity is barred by other provisions of the claims legislation, even when the public entity is otherwise immune from liability. Government Code section 950.2. An action against the public entity is barred unless a written claim has been previously presented to the state in accordance with applicable provisions. Government Code section 945.4.

A claim with the state is required for all claims for damages for an injury for which the state is liable. Government Code sections 905.2(c)(2), 915(b). By virtue of the provisions of Government Code section 950.2, *supra,* such a claim is required despite the immunity of the state and despite the language of Government Code section 905.2 (c)(2), *supra,* conditioning the requirement of a claim on liability of the state.

The contents of the claim are set out in Government Code section 910. That claim must be presented not later than

the 100th day after accrual of the action. In this case, accrual of the action was factually determined to have taken place in January 1972, when petitioner wrote his letter of complaint. That complaint was further held not to comply with the provisions of Government Code section 910, *supra*. The claim filed in May 1972, was not timely because more than 100 days had elapsed from first knowledge. Because this claim was not timely, and the appellate court ruled that respondent was not estopped from asserting untimeliness of the claim as a defense, the judgment in favor of petitioner was reversed.

This is the legislative scheme which as applied to petitioner is believed to violate petitioner's rights to due process of law. Petitioner had by imprisonment been deprived of his civil rights, Penal Code section 2600, including capacity to file or maintain a civil suit, *Snebold v. Justice Court*, 201 Cal. App. 2d 152, 19 Cal. Rptr. 704 (1962), until those rights were restored in August 1974. The claims statutes nevertheless required that he, while imprisoned, conform to the letter of the statutes and file a claim within 100 days of his first awareness of possible malpractice. That awareness preceded by approximately fifteen months petitioner's release from prison and the amputation of his leg. It preceded by over two and one-half years the restoration of his right to bring his civil suit for damages.

Due process further is believed to have been violated by the extension of the umbrella of the state's sovereign immunity to the respondent physician, even though the state is otherwise immune and not liable for the injury to petitioner. Indeed, in the statutory scheme, the state, whether

or not it is immune and whether or not it agrees by statute or otherwise to defend and indemnify a public employee, throws the mantle of claims requirement protection around any public employee. As a matter of due process, applying claims statutes, with all of their traps for the unwary, to all public employees for all negligent acts or omissions, regardless of the state's own immunity or liability and regardless of the type of activity engaged in by the employee, would seem to go too far.

The cause of action asserted by petitioner is not one created by the state, which can be therefore conditioned by the state. *But cf. Ferri v. Anchorman,* 62 L. Ed. 2d 355 (1979). The action for negligence is a common law action, derived from the principle of long standing that "every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights." California Civil Code section 1708. The state here conditioned that right by the complexities of the statutory claims provisions set out above, to the detriment of a state prisoner seeking a remedy against a physician for medical malpractice. In the context of the facts of this case, and recognizing the application to other cases, petitioner submits that his right to due process of the law has been violated.

Petitioner's right to equal protection of the law has been violated by setting forth different rights for the class of which petitioner was a part, a prisoner seeking a remedy against a public employee, as opposed to prisoners seeking a remedy against a private person. In the latter case, without a claims filing requirement, the prisoner's action is tolled while in prison. In petitioner's case,

the action was tolled and the complaint was timely filed but, by virtue of his failure to conform to the claims provisions, it was also barred. Such is not equal protection of the laws.

The matters set forth above are not believed to be unique to the problems of prisoners, nor are they unique to California. They may be more or less onerous in other states insofar as prisoners are concerned. Insofar as other classes of persons injured by the acts or omissions of public employees are concerned, the problems and solutions will vary from state to state. Petitioner does not seek to cure all ills in seeking this writ. He does ask this Court, however, to restore elemental justice to the maze which has denied him the judgment previously awarded him. He asks this Court by its review and judgment to inform California and such other states as may be similarly situated that the due process and equal protection provisions of the fourteenth amendment are not only applicable to prisoners, but may not be denied them by a statutory scheme such as exists in California.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: January 30, 1980, at Sacramento, California.

Respectfully submitted,

GERALD J. ADLER
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(Appendices follows)

Appendices

Appendix A

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[Filed Aug. 16, 1977]

Superior Court of California, County of Sacramento

No. 235773

Donald Ditto,
Plaintiff,

vs.

State of California, et al.,
Defendants.

JUDGMENT

This matter came on regularly for hearing on May 9, 1977, in Department 18 of the Superior Court of the State of California, in and for the County of Sacramento, the Honorable John Boskovich presiding, plaintiff DONALD DITTO being represented by Richard F. Mills Law Corporation, and Defendant DAVID ROSENDALE being represented by James H. Wernicke, Deputy Attorney General, for the State of California, and all evidence having been heard and Findings of Fact and Conclusions of Law filed, it is hereby ordered, adjudged and decreed:

That plaintiff DONALD DITTO have and recover damages in the sum of $159,500.00 from defendant DAVID ROSENDALE, plus costs of suit.

Dated: August 16, 1977.

[Seal]

/s/ John Boskovich
Judge of the Superior Court

Appendix B

Not to be Published in Official Reports
In the Court of Appeal of the State of California
in and for the Third Appellate District

(Sacramento)

[Filed July 20, 1979]

3 Civil 17227
(Super. Ct. No. 235773)

Donald Ditto,
Plaintiff and Respondent,
vs.
David Rosendale, M.D.,
Defendant and Appellant.

OPINION ON REHEARING

See Concurring and Dissenting Opinion

Defendant, Dr. David Rosendale, a physician employed by the California Department of Corrections at Folsom Prison, appeals from a judgment awarding plaintiff, a former inmate, $159,500 in a medical malpractice action.[1]

Drs. Rosendale and Shaffrath, a private orthopedist, treated plaintiff's broken leg at Folsom Prison. During

[1]Defendants, State of California, Department of Corrections, and Dr. M. D. Shaffrath, were not involved in the trial and are not parties in this appeal. The demurrer of the State and the Department of Corrections to the second amended complaint was sustained without leave to amend. Dr. Shaffrath and the Does were dismissed as defendants prior to trial.

the course of treatment the leg became infected causing plaintiff to write to the chief surgeon of the Department of Corrections seeking a transfer so that adequate medical treatment might be received. In response he was assured that all medical procedures then being utilized were correct, and that adequate future medical treatment would be available.

Subsequently, in April 1973, his leg was amputated below the knee. The exchange of correspondence took place on January 10 and 26, 1972.

Plaintiff filed a claim for damages with the State Board of Control on May 26, 1972, and a petition to file a late claim on June 9, 1972. The original claim was denied (inferably because it was not timely filed; Gov. Code § 911.2) on July 5, and the petition to file a late claim was denied on July 19, 1972.

On January 17, 1973, plaintiff filed an action pursuant to Government Code section 946.6[2] (superior court pro-

[2]Government Code section 946.6 provides in pertinent part, "(a) Where an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from the provisions of Section 945.4. . . .

"(b) The petition must show (1) that application was made to the board under Section 911.4 and was denied or deemed denied, (2) the reason for failure to present the claim within the time limit specified in Section 911.2 and (3) the information required by Section 910. The petition shall be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6.

"(c) The court shall relieve the petitioner from the provisions of Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that:

ceeding No. 230389) seeking relief from the requirement that a claim for damages resulting from injury be filed with the State Board of Control not later than the one hundredth day after the accrual of the action.

Following an evidentiary hearing, the matter was argued, submitted, and denied on February 6, 1973.

Although relief was denied, the plaintiff nonetheless filed the present action seeking damages against each of the named defendants (fn. 1, *ante* p. 1). The defense of failure to file the required claim in a timely fashion was raised by the answer of defendant Rosendale and the others, but at trial, the court found the defendant to be equitably estopped from asserting that claim and rendered judgment in plaintiff's favor.

On appeal the defendant presents two contentions: (1) the court erred by applying the doctrine of equitable estoppel against the defendant; and (2) the court's refusal to apply the doctrine of res judicata relative to the defense of failure to file a timely claim pursuant to Government Code section 911.2 was error.

Preliminarily, a brief background statement of the claim-filing requirements and available procedures is required as a predicate for our disposition of the issues raised.

"(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect . . .

". . .

"(f) If the court makes an order relieving the petitioner from the provisions of Section 945.4, suit on the cause of action to which the claim relates must be filed in such court within 30 days thereafter."

Unless otherwise noted, any future code references will be to the Government Code.

Government Code Section 911.2 provides in relevant part, "A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented [to the public entity] . . . not later than the 100th day after the accrual of the cause of action. . ."

Section 945.4 implements that requirement by declaring that absent such a timely claim, *no action for damages can be filed against the public entity.* (Williams v. Horvath (1976) 16 Cal.3d 834, 838; Smith v. City and County of San Francisco (1977) 68 Cal.App.3d 227, 230.)

Additionally, section 950.2 states that, ". . . a cause of action against a public employee . . . for injury resulting from an act or omission in the scope of his employment . . . is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immune from liabilty for the injury." Accordingly, submission of a claim within 100 days is a condition precedent to a tort action against the public employee or the public entity.

The claim requirements are equally applicable to prisoners as well as all other persons sustaining injury as a result of public entity activity. (§ 950.6.)

I

It is undisputed that failure to file the required claim in proper circumstances may be excused and the governmental agency estopped from urging strict compliance with the statutory provisions. (Fredrichsen v. City of Lakewood (1971) 6 Cal.3d 353, 357.)

In order to apply the doctrine of estoppel, four fundamental elements must first be established: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct of his injury. [Citations.]" (Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 305.)

Without conceding that any of these elements have been met, we believe the third element to be the key. "In order to prove the third essential, it is necessary that the evidence show not only that the party claiming the estoppel did not have actual knowledge of the true facts but that he did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of which would have led to actual knowledge; the convenient or ready means of acquiring knowledge being the equivalent of knowledge [citations]." (Banco Mercantil v. Sauls Inc. (1956) 140 Cal.App.2d 316, 323; LaRue v. Swoap (1975) 51 Cal.App.3d 543, 551.)

In its findings of fact, the court set forth the predicates which it felt justified the application of equitable estoppel. They were (1) a letter from the chief medical officer of the Department of Corrections dated January 26, 1972; and (2) oral assurances made by defendant at that time that

plaintiff had and would continue to receive competent medical care. However, in the findings of fact, we find the following: "At least by January 10, 1972, plaintiff was aware of possible malpractice by the defendant." Moreover, the court correctly observed that plaintiff, in a prior deposition, indicated that he was aware that he was not getting adequate medical treatment as early as October 2, 1971; and at trial, the plaintiff testified that in January 1972, he was aware that the doctors at the Folsom Prison Hospital had been negligent.

The court's findings, its observations, and the testimony of the plaintiff by deposition and at trial clearly reveal that plaintiff not only had "notice of facts sufficient to put a reasonably prudent man upon inquiry," he had actual knowledge of the act of malpractice. Under such circumstances, the trial court erred in applying the doctrine of equitable estoppel, thus precluding defendant from asserting as a defense plaintiff's failure to file a timely claim. (LaRue v. Swoap, supra, 51 Cal.App.3d at p. 551.)

II

At the time of trial on the complaint for damages resulting from the alleged medical malpractice, the court elected to bifurcate the proceedings and decide first whether a timely claim had been filed. Its determination was adverse to the plaintiff; however, the court then proceeded to a determination of whether plaintiff should be excused from the filing requirement by reason of Dr. Rosendale's conduct and the principle of equitable estoppel; the court's ruling was in plaintiff's favor notwithstanding the objection of the State that the issue was res judicata as a result of the earlier section 946.6 proceeding.

The contentions that application of the principle of equitable estoppel is not supported by fact, and the court erred by failing to apply the doctrine of res judicata are valid. We will reverse the judgment.

The process pursued in a section 946.6 proceeding is in fact one of deciding whether by reason of "mistake, inadvertence, surprise or excusable neglect" the plaintiff should be relieved from compliance with the claim-filing requirement and the public entity estopped from asserting that failure as a defense. Such a proceeding was accomplished adversely to the plaintiff in February 1973 in action No. 230389.

An adverse decision to the plaintiff in a 946.6 proceeding constitutes a final determination of the plaintiff's rights and is an appealable order. (Chuch v. County of Humboldt (1967) 248 Cal.App.2d 855.) The record fails to reveal any appeal from the order of February 6, 1973, denying relief to the plaintiff pursuant to section 946.6 (superior court proceeding No. 230389), and thus it becomes a final judgment determinative of the plaintiff's right to relief from the claim-filing requirement or from asserting an estoppel against the State from entering that plea by way of defense.

The court below exceeded its jurisdiction when it undertook a determination of fact and law previously decided adversely to the plaintiff by another court.

"The validity of a plea of res judicata or collateral estoppel depends on the affirmative answer to three questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? and (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (Hone v. Climatrol Industries, Inc. (1976) 59 Cal.App.3d 513, 529.)

In this instance, each question is answered affirmatively. First, the issue raised in the prior proceeding was identical to that decided by the court below, i.e., should the plaintiff be relieved from the claim-filing requirements? That question was originally decided adversely to the plaintiff after a full evidentiary hearing. Second, the court's determination was a final judgment on the merits from which an appeal was not taken. (See Church v. County of Humboldt, supra, 248 Cal.App.2d 855.) And last, the parties to both proceedings were identical.

Defendant's plea of res judicata should have been invoked by the court and the defense of failure to file a timely claim sustained.

For the foregoing reasons, the judgment is reversed.

/s/ Evans, J.

I concur in the judgment and in the opinion of the court except for Part II thereof.

/s/ Puglia, P.J.

I dissent. This case does not concern the failure to file a timely lawsuit. Plaintiff was an inmate of a state prison at the time the negligent acts occurred and did not have the legal capacity to file a civil suit. At trial defendant stipulated to the date that plaintiff's civil rights were restored and conceded that the lawsuit was timely filed thereafter. (See Gov. Code, § 945.6, subd. (b).) Defendant contended at trial, and argues on appeal, that plaintiff failed to file a timely claim with a public agency pursuant to Government Code section 911.2, and that by virtue of Government Code section 945.4, a lawsuit is precluded. For the reasons I will explain below, Government Code sections 911.2 and 945.4 do not bar plaintiff's suit under the circumstances of this case and the judgment should thus be affirmed.

I

Defendant contends that the decision of the superior court in a prior action (Super.Ct. No. 230389), precludes the present action through res judicata or collateral estoppel. In the prior action plaintiff sought relief from being barred from bringing an action because of the nonrepresentation of his claim to the State Board of Control. (Gov. Code, § 946.6.) The lead opinion of this court, which accepts defendant's argument that the prior action precludes the present action, does not speak for the majority of the court on that issue, having failed to secure the concurrence of two justices. In my view neither res judicata nor collateral estoppel bars plaintiff's suit.

Res judicata depends upon the jurisdiction of the original court (Martin v. Martin (1970) 2 Cal.3d 752, 758-759, citing Bernhard v. Bank of America (1942) 19 Cal.2d 807,

810); here, the jurisdiction of the court to grant relief under Government Code section 946.6, subdivision (c)(1) is limited to the grounds of "mistake, inadvertance, surprise or excusable neglect" where there is no showing of prejudice to the public entity. At trial plaintiff sought to estop defendant from asserting the failure to file a timely claim by reason of reasonable reliance upon a fiduciary relationship. The court that considered plaintiff's petition under Government Code section 946.6 was without jurisdiction to rule on this issue, and thus plaintiff cannot be barred from presenting that issue through res judicata.

Further, in order for res judicata to be applicable, the prior action must result in a final decision on the merits. (Bernhard v. Bank of America, supra, 19 Cal.2d at p. 813; Hone v. Climatrol Industries, Inc. (1976) 59 Cal.App.3d 513, 529, at fn. 6.) A judgment is not on the merits when it is based on rules of procedure instead of substantive law. (4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, § 168, p. 3311.) A judgment entered in favor of the defendant upon a determination that the plaintiff has not complied with a necessary precondition for the suit is not a judgment on the merits. (American Broadcasting Companies, Inc. v. Walter-Reade-Sterling, Inc. (1974) 43 Cal.App.3d 401, 409-410; GMS Properties, Inc. v. Superior Court (1963) 219 Cal.App.2d 407, 415.) The proceeding under Government Code section 946.6 only results in a determination whether compliance with procedural steps regarding the filing of a claim should be excused for certain specified reasons, and is thus not a decision on the merits. Res judicata therefore does not bar the presentation of a claim of equitable estoppel to assert failure to file a claim as a defense.

Neither does collateral estoppel bar plaintiff from litigating the issue of equitable estoppel. Collateral estoppel will act as a bar to those issues actually litigated in a prior suit. (Clark v. Lesher (1956) 46 Cal.2d 874, 880.) The burden is on the party asserting the collateral estoppel to show that the identical issue was actually litigated. (Dillard v. McKnight (1949) 34 Cal.2d 209, 219; Erlich v. Superior Court (1965) 63 Cal.2d 551, 557.) The issues in a proceeding under Government Code section 946.6 are clearly prescribed and a person seeking relief from a failure to file a claim must show that he falls within one of the enumerated categories. (Tammen v. County of San Diego (1967) 66 Cal.2d 468, 474; Clark v. City of Compton (1971) 22 Cal.App.3d 522, 526.) The record, as the trial court found, does not support a contention that the issue of equitable estoppel was actually litigated in the prior proceeding, and thus collateral estoppel is inapplicable as a bar to that issue.

The trial court held that defendant was equitably estopped to assert the failure to file a timely claim as a defense against a lawsuit. It is settled that a public agency may be estopped to assert the claim filing statute. (Fredrichsen v. City of Lakewood (1971) 6 Cal.3d 353, 357.) The existence of an estoppel is generally a question of fact for the trial court and its determination is conclusive on appeal unless the opposite conclusion is the only one that can be drawn from the evidence. (Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 305; Albers v. County of Los Angeles (1965) 62 Cal.2d 250, 266.) In

my view there was substantial evidence before the trial court which supports its determination and that determination should be affirmed.

Generally speaking, there are four elements to the doctrine of equitable estoppel: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (Driscoll v. City of Los Angeles, supra, 67 Cal.2d at p. 305.) The majority focus on the third element, that the plaintiff must be ignorant of the true state of facts, in ruling that equitable estoppel did not apply.

The trial court found that "at least by January 10, 1972, plaintiff was aware of possible malpractice by the defendant." The court thus did not find that plaintiff was actually aware of an act of malpractice. The majority nevertheless hold that plaintiff had actual knowledge because at trial he stated that he believed the doctors had been negligent. Plaintiff's entire testimony, and the exhibits before the court, indicate that plaintiff was not actually aware of negligence, he merely suspected negligence since his leg had not healed the way he believed it should have. Plaintiff had not been told by anyone that negilgence had occurred. In his deposition plaintiff stated that he was concerned only because his foot hurt and "pus and stuff run out of it." In the letter to Dr. Gorman, which is the basis of the trial court's finding that plaintiff was aware of possible negligence, plaintiff stated that he still believed that his leg could be saved, and that he believed

that his problem should not have resulted from a broken ankle. This evidence supports the trial court's finding that plaintiff's knowledge was only of the possibility of malpractice, and not actual knowledge of malpractice.

The opinion in Sanchez v. South Hoover Hospital (1976) 18 Cal.3d 93, supports the trial court's interpretation of the evidence. In that case a plaintiff had been under the defendants' care after a Caesarian section and had been told by a hospital employee that the operation was poorly performed. (*Id.*, at pp. 95-96.) The plaintiff was suspicious and had tentatively decided to bring a suit. (*Ibid.*) In referring to the date of her discharge from the defendants' care, the plaintiff stated, "Yes, I did think that they had done something wrong because of all the time I stayed there suffering." (*Id.*, at p. 102.) The Supreme Court held that it was arguable that the plaintiff had notice of the negligence prior to her discharge, but did not decide that issue because at the time of her discharge she had "become alerted to the necessity for investigation and pursuit of her remedies." (*Ibid.*) Of interest herein is that the Supreme Court, when faced with evidence that a plaintiff believed that negligence had occurred due to her dissatisfaction with her medical progress, held that the plaintiff had notice, but did not hold that she had actual knowledge of the negligence. The evidence herein is even less indicative of actual knowledge, since plaintiff had not been informed by any other person that negligence may have occurred, but based his belief solely upon his dissatisfaction with his progress.

"Presumptive" as well as "actual" knowledge of malpractice will commence the running of a statute of limi-

tations. (*Id.*, at p. 101.) However, whether notice of the possibility of malpractice can be considered "presumptive" knowledge depends upon consideration of the circumstances of the case. Thus, when a plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation, the statute commences to run. (*Ibid.*) "On the other hand, the patient is fully entitled to rely upon the physician's professional skill and judgment while under his care, and has little choice but to do so. It follows, accordingly, that during the continuance of this professional relationship, which is fiduciary in nature, the degree of diligence required of a patient in ferreting out and learning of the negligent causes of his condition is diminished." (*Id.*, at p. 102.)

In considering whether plaintiff's state of mind at the time he wrote to Dr. Gorman was such that he cannot, as a matter of law, be held to have been ignorant of the true state of facts, we must consider all the circumstances of the case. In that respect it is significant that plaintiff was a prisoner in a state prison and did not have the freedom to change physicians or to freely seek the advice of other experts. Plaintiff made every effort that could reasonably be expected of him to find out the true state of facts when he wrote to Dr. Gorman and spoke to "everybody I could right there at the prison." Despite the efforts plaintiff made to find out the cause of his condition, the only information he received consisted of assurances of Dr. Gorman and Dr. Rosendale that everything would be taken care of and that he was receiving competent and

adequate medical care. The evidence thus supports the trial court's findings and this court, under the well-established standard of appellate review, should not substitute its judgment for that of the trial court.

While I believe the evidence supports the trial court's finding that plaintiff did not have actual or presumptive knowledge that medical malpractice had occurred when he wrote the letter in January, 1972, the majority opinion is erroneous for an even more fundamental reason. It is clear that plaintiff was not seeking a monetary recovery at the time he wrote the letter. He indicated concern that he might lose his leg or the use of his leg if he did not receive better care, and his purpose in writing the letter was expressly stated thusly: "I'm demanding to be sent to San Quinton [*sic*] where I can receive decent medical treatment." Defendant's response to plaintiff's request was (1) a promise that proper treatment would be given, and (2) an assurance that he would recover. Whether or not plaintiff can be held to have possessed actual or presumptive knowledge that negligence had occurred at the time he wrote the letter, there is no evidence of any nature in the record by which plaintiff can be held to have possessed knowledge that proper medical treatment would not be provided or that his condition would not improve. It was these assurances that plaintiff relied on in delaying taking action, and it is clear that plaintiff was thus ignorant of the true state of facts to which the representations related.

It is settled that a physician who represents to a patient that his condition needs further treatment and will improve cannot rely upon a statute of limitations when

the patient delays taking action due to those representations. (Carlock v. Cole (1962) 199 Cal.App.2d 11, 16; see also, Stafford v. Shultz (1954) 42 Cal.2d 767, 776-779.) In considering whether defendant should be estopped to assert the claim filing statute it must be remembered that in January, 1972, when plaintiff wrote to Dr. Gorman and spoke with Dr. Rosendale, he had not yet lost his leg and had no information that his leg would ultimately need to be amputated. Although he believed he could be cured, he was fearful that he might lose his leg or the use of it, and contacted his treating physicians solely to secure treatment to prevent such an occurrence. In reply defendant assured plaintiff that everything would be taken care of and that he would receive competent and adequate care. It is clear that plaintiff delayed contacting a lawyer due to those representations. The evidence thus establishes a classic case of equitable estoppel. (*Ibid.*)

III

Despite his request to be transferred, plaintiff remained in defendant's care until September 25, 1972. His injury, the loss of his leg, did not occur until April 27, 1973. The time in which a claim must be presented to a public agency begins upon accrual of the cause of action. (Gov. Code, § 911.2.) A cause of action has been held not to accrue until the plaintiff has discovered both the injury and the negligent cause thereof. (Whitfield v. Roth (1974) 10 Cal. 3d 874, 885.) There is also authority for the deferment of the accrual during continuing treatment by a physician. (Trombley v. Kolts (1938) 29 Cal.App.2d 699, 709.) The continuance of the physician-patient relationship has been

held to defer the accrual of the cause of action. (Weinstock v. Eissler (1964) 224 Cal.App.2d 212, 227.) Under any of these authorities, plaintiff's cause of action did not accrue more than 100 days prior to the time he filed the claim. We need not consider whether these authorities are applicable, however, as there is another reason the cause of action had not then accrued.

On appeal we are required to indulge in all presumptions and intendments in favor of the judgment of the trial court. The plaintiff alleged, and the trial court found, that defendant was negligent in the entire course of his treatment of plaintiff. That treatment continued until September 25, 1972. Although plaintiff became dissatisfied with the treatment he had received in January, 1972, his complaint to his physicians did not result in proper treatment being accorded his problem. We thus have a situation not only of continuing treatment, but of continuing negligence. Where the defendant's negligence continues beyond the date a plaintiff has discovered prior negligence, the repetition of the wrong creates further liability. (See Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 937.) The trial court found that defendant's continuing negligence up to September 25, 1972 was the cause of the injury. Plaintiff was thus entitled to file a claim on defendant's negligence at any time within 100 days of the termination of that negligence, and his claim filed in May, 1972, was thus timely.

• • • • •

The majority opinion results in a holding that plaintiff was required, at his peril, to file a claim within 100 days of the date he first became dissatisfied with defendant's

treatment despite that fact that his injury had not yet occurred, he still believed his injury could be avoided, and he was assured by defendant that proper treatment would be accorded and his injury avoided. Plaintiff's failure to file the claim at that time shields defendant from liability for a subsequent injury due to subsequent negligence. The error in such a holding is manifest.

/s/ REYNOSO, J.

Appendix C

MINUTES

SUPREME COURT

San Francisco, October 11, 1979.

3 Civ. 17227—Ditto v. Rosendale. Respondent's petition for hearing denied. Bird, C. J., Tobriner, J., and Mosk, J., are of the opinion that the petition should be granted.

Appendix D

Civil Code § 1708. Abstinence from injuring others.

Abstinence from Injury. Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights.

(Enacted 1872.)

Code of Civil Procedure § 335. Periods of limitation.

Periods of limitation prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

(Enacted 1872.)

Code of Civil Procedure § 340.5. Professional negligence, etc., of physician, hospital, etc.: Tolling of time limitation

In an action for injury or death against a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, veterinarian, or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, four years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs. This time limitation shall be tolled for any period during which such person has failed to disclose any act,

error, or omission upon which such action is based and which is known or through the use of reasonable diligence should have been known to him.

Added Stats 1970 ch 360 § 1.

Code of Civil Procedure § 352. Exception, as to persons under disabilities

(a) If a person entitled to bring an action, mentioned in chapter three of this title, be, at the time the cause of action accrued, either:

1. Under the age of majority; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,

4. A married woman, and her husband be a necessary party with her in commencing such action; the time of such disability is not a part of the time limited for the commencement of the action.

(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

Enacted 1872; Amended Stats 1959 ch 192 § 1; Stats 1970 ch 104 § 1, operative January 1, 1971.

Government Code § 815. Liability for injuries generally; immunity of public entity; defenses.

Except as otherwise provided by statute:

(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

(Added Stats. 1963, c. 1681, p. 3268, § 1.)

Government Code § 815.2 Injuries by employee within scope of employment; immunity of employee.

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

(Added Stats. 1963, c. 1681, p. 3268, § 1.)

Government Code § 820. Liability for injuries generally; defenses.

(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused

by his act or omission to the same extent as a private person.

(b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person.

(Added Stats. 1963, c. 1681, p. 3269, § 1.)

Government Code § 825. Request for defense or defense by public entity; payment of judgment, compromise or settlement; agreement with employee; reservation of rights.

If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employ-

ment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.

(Added Stats. 1963, c. 1681, p. 3270, § 1.)

Government Code § 844.6 Injuries by and to prisoners.

(a) Notwithstanding any other provisions of law, except as provided in subdivisions (b), (c) 3, and (d) of this section, a public entity is not liable for:

(1) An injury proximately caused by any prisoner.

(2) An injury to any prisoner.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Nothing in this section prevents a person, other than a prisoner, from recovering from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any

public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment based on a claim against a public employee licensed in one of the healing arts under Division 2 (commencing with Section 500) of the Business and Professions Code for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action based on such malpractice to which the public entity has agreed.

(Added Stats.1963, c. 1681, p. 3277, § 1.)

Government Code § 905.2 Claims for money or damages against state; law governing presentation in certain cases.

There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the State:

(a) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(b) For which the appropriation made or fund designated is exhausted.

(c) For money or damages (1) on express contract, (2) for an injury for which the State is liable or (3) for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution.

(d) For which settlement is not otherwise provided for by statute or constitutional provision.

(Added Stats.1963, c. 1715, p. 3372, § 1.)

Government Code § 910. Contents of claim.

A claim shall be presented by the claimant or by a person acting on his behalf and shall show:

(a) The name and post office address of the claimant;

(b) The post office address to which the person presenting the claim desires notices to be sent;

(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;

(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim;

(e) The name or names of the public employee or employees causing the injury, damage, or loss, if known; and

(f) The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

(Added Stats.1963, c. 1715, p. 3374, § 1, as amended Stats.1965, c. 653, p. 2010, § 1.)

Government Code § 911.2 Time for presentation of claims.

A claim relating to a cause of action for death or for injury to person or to personal property or growing crops

shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than the 100th day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action.

(Added Stats.1963, c. 1715, p. 3372, § 1.)

Government Code § 915. Presentation to local public entity.

(a) A claim, any amendment thereto, or an application to the public entity for leave to present a late claim shall be presented to a local public entity by:

(1) Delivering it to the clerk, secretary or auditor thereof; or

(2) Mailing it to such clerk, secretary or auditor or to the governing body at its principal office.

(b) A claim, any amendment thereto, or an application for leave to file a late claim shall be presented to the state by:

(1) Delivering it to an office of the State Board of Control; or

(2) Mailing it to the State Board of Control at its principal office.

(c) A claim, amendment or application shall be deemed to have been presented in compliance with this section even though it is not delivered or mailed as provided in this section if it is actually received by the clerk, secretary, auditor or board of the local public entity, or is actually received at an office of the State Board of Control, within the time prescribed for presentation thereof.

(d) A claim, amendment or application shall be deemed to have been presented in compliance with this section to a public agency as defined in Section 53050 if it is delivered or mailed within the time prescribed for presentation thereof in conformity with the information contained in the statement in the Roster of Public Agencies pertaining to that public agency which is on file at the time the claim, amendment or application is delivered or mailed. As used in this subdivision, "statement in the Roster of Public Agencies" means the statement or amended statement in the Roster of Public Agencies in the office of the Secretary of State or in the office of the county clerk of any county in which such statement or amended statement is on file.

(Added Stats.1963, c. 1715, p. 3372, § 1, as amended Stats. 1965, c. 653, p. 2012, § 8.)

Government Code § 945.4 Necessity of written claim acted upon by board or deemed to have been rejected.

Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

(Added Stats.1963, c. 1715, p. 3383, § 2, as amended Stats. 1965, c. 653, p. 2014, § 17.)

Government Code § 950. Necessity for presentation of claim against public employee.

Except as otherwise provided in this chapter, a claim need not be presented as a prerequisite to the maintenance of an action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee.

(Added Stats.1963, c. 1715, p. 3383, § 2.)

Government Code § 950.2 Grounds for barring cause of action.

Except as provided in Section 950.4, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immune from liability for the injury.

(Added Stats.1963, c. 1715, p. 3383, § 2, as amended Stats. 1965, c. 653, p. 2017, § 23.)

Penal Code § 2600. Suspension and partial restoration of civil rights; forfeiture of public office or position of trust; continued rights

A sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sen-

tenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment. But the Adult Authority may restore to said person during his imprisonment such civil rights as the authority may deem proper, except the right to act as a trustee, or hold public office or exercise the privilege of an elector or give a general power of attorney.

Between the time of the imposition of a sentence of imprisonment in a state prison for any term and the time the said person commences serving such sentence, the judge who imposed such sentence may restore to said person for said period of time such civil rights as the judge may deem proper, except the right to act as a trustee, or hold public office or exercise the privilege of an elector or give a general power of attorney.

This section shall be construed so as not to deprive such person of the following civil rights, in accordance with the laws of this state:

(1) To inherit real or personal property.

(2) To correspond, confidentially, with any member of the State Bar, or holder of public office, provided that the prison authorities may open and inspect such mail to search for contraband.

(3) To own all written material produced by such person during the period of imprisonment.

(4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to

exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery. Nothing in this section shall be construed as limiting the right of prison authorities (i) to open and inspect any and all packages received by an inmate and (ii) to establish reasonable restrictions as to the number of newspapers, magazines, and books that the inmate may have in his cell or elsewhere in the prison at one time.

(Added by Stats.1941, c. 106, p. 1091, § 15. Amended by Stats.1941, c. 489, p. 1798, § 3; Stats.1957, c. 2256, p. 3928, § 2; Stats.1963, c. 1792, p. 3621, § 1; Stats.1968, c. 1402, p. 2763, § 1.)